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No. 85-103

In The

Supreme Court of the United States

October Term, 1985

GREAT LAKES DREDGE & DOCK COMPANY, INC.,
Petitioner,

v.

DEBORAH FURKA,
Administratrix of the Estate of
PAUL FURKA,
Deceased,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

In January, 1982, work on the Hart-Miller maritime project was progressing one day at a time on account of foul weather. A. 197.[1] It was one of the worst winters ever in Baltimore. A. 170. Yet work went on in accordance with defendant's policy to work in anything short of a hurricane. A. 197. On the morning of January 9, 1982, defendant's superintendent knew of the day's weather forecast, A. 147; specifically, that small craft advisories were in effect, winds were out of the southwest 10-20 knots becoming northwest 15-25 knots occurring about mid-day and 20-30 knots with higher gusts that night. A. 147. Waves of one to three feet were

[1] Citations to the Joint Appendix filed in the Fourth Circuit are designated "A. __."

expected to increase to two to four feet in the afternoon. A chance of a snow squall with poor visibility was forecast as were gale warnings that night. A. 148. He discussed the weather forecast with Tim Sullivan, the chief mate of rock construction. A. 145, 149-50. He and Sullivan planned to finish that day's work about 2:00-2:30 p.m. and the crew would be sent home because of the weather. A. 171-72. A problem delayed this plan, however, and the superintendent left the project site around 4:30-4:45 p.m., knowing the Boston Whaler was to be used by Furka to mark the grade, but without informing Paul Furka of the forecast or warning him not to do so. A. 168.

Four tugs worked on the project. On the fatal day the Tug Diamond State, while attempting to moor her rock scow tow, suffered a mechanical breakdown of her rudder and power, A. 463, 473, 349, and, without benefit of anchors, was drifting out to sea with the tide. The temperature was near freezing. A. 515. Sal Sanzone, a scowman, stood on the open scow deck cold and wet. The Tug Diamond State's captain, called for help for Sanzone to "get him off before he freezes to death," because he'd been out there cold and wet in freezing temperatures for two hours. A. 467, 473. The tug and scow were floundering and neither had anchoring capability. A. 309, 351, 260.

Tom Widmeier, the mate on the Dredge 135 who took the call over the radio channel, testified the captain sounded in desperate trouble. A. 260-262. Widmeier replied that he would "send somebody," A. 350, and then demanded over the open channel that "everybody drop everything and get out there" because Sanzone was out there wet from the snow and cold in the wind. A. 257-259.

There were no tugs available to go. The Tug Tarheel State was alongside the Dredge Georgia with a bad filter,

A. 257, and no crew. A. 215. The Tug Hawkeye State was busy moving a "stiff leg." A. 218. The Wonder State, assigned to the job's inspectors, Century Engineering, could not be raised by radio, A. 218, and the crew boat Lady Vet was some 45 minutes away. A. 218. Widmeier conveyed a sense of urgency to Sullivan, A. 226, and asked him to take a Boston Whaler and rescue Sanzone. A. 276. Sullivan declined, A. 276.

Widmeier, himself, was about to take the Whaler and go to Sanzone's rescue when Furka said he would go. A. 265. Furka was provided with a ladder and two life jackets, A. 261, one of which he put on, A. 359, 461, took the Whaler and set out to the scow. Furka got to the scow but Sanzone declined to risk getting off into the small boat. A. 261, 351. Paul radioed this circumstance and that he was heading back in. A. 261. The storm blew up quickly and by the time he turned around to head back, he could not make it. A. 89-90. Shortly thereafter, Furka was heard to say on the radio, "Tommy, I'm taking water; I don't think I'll make it." A. 46, 352. He did not.

The Trial Court's Errors

The jury could have found that Furka lost his life in a rescue effort. The trial court failed to charge the jury that in such an emergency the rescuer should only be found to have been contributorily negligent if he acted recklessly or wantonly. The trial court failed even to caution the jury that in saving another from danger it would be "naturally assumed that the ordinary man of average prudence would not and could not reasonably be expected to act under tension with the same care, forethought and deliberation as ought to be expected of such a person when not acting under stress," *Asaro* v. *Parisi*, 297 F.2d 859 (1st. Cir.), *cert. denied*, 370 U.S. 904

(1962). The Court of Appeals held that because rescue was the "sole of appellant's case," App. 11,[2] the contributory negligence charge given, App. 9, was plainly erroneous. Plaintiff had objected to jury submission of contributory negligence four times, A. 16-17, A. 342, A. 513, A. 547-548.

Moreover, the trial court failed to invoke the "second prong of the rescue doctrine," App. 12, whereby the "violation of a duty to one who is imperiled is also a violation of a duty to the rescuer," App. 12-13. That, too, mandated a new trial. App. 13.[3]

REASONS FOR DENYING THE WRIT

Both reasons for reversal and remand were correct and each was consistent with federal maritime law. *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970); *Asaro* v. *Parisi*, 297 F.2d 859 (1st. Cir.), *cert. denied*, 370 U.S. 904 (1962).

Danger Invites Rescue

Perhaps no better statement of the rescue doctrine can be found than Justice Cardozo's classic in *Wagner* v. *International Railroad Co.*, 232 N.Y. 176, 133 N.E. 437 (1921):

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[2] References to material in the Appendix to the Petition are designated "App. ___."

[3] The Court of Appeals was mistaken in saying, App. 12, that this point was raised for the first time on appeal. Plaintiff's attorney requested the trial court to charge the jury that any unseaworthiness of the tug and barge imperiling the rescuer would inure to the benefit of and serve as a basis of "unseaworthiness" liability for Furka against defendant, A. 325-326; and took exception to the court's failure to so charge, A. 547-548.

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid . . . The risk of rescue, *if only it be not wanton,* is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of the deliverer. He is accountable as if he had . . ." (Emphasis added)

The same rules apply in maritime cases, *Grigsby* v. *Coastal Marine Service of Texas, Inc., supra* pp. 1021-1023:

> "For all the branches of jurisprudence, the admiralty must be the most hospitable to the impulses of man and law to save life and limb and property . . .
>
> "In matching law to man's needs, moral and physical, the admiralty would be the first to accord great liberality to this doctrine. Indeed, as the admiralty looks at it, the greater the risk, the greater the seafaring man's obligation to respond . . . His [Grigsby's] impulsive action in the best tradition of the sea gave him this highly preferred status."

Indeed, when a seaman-rescuer heeds the cry for rescue *Grigsby* holds it to be "almost captious to suggest that his conduct was so lacking in prudence as to forfeit the status or benefits of its [the rescue doctrine's] protection," 412 F.2d at 1022.

Thus the usual rule respecting ordinary care for one's safety is displaced in rescue situations. As Judge Wilkerson so aptly stated:

> "In rescue, promptness may be prudence, and reflex may claim the seat of reason." App. 9.

and

> "Hazard inheres in the enterprise. A jury, assessing the situation at a time and place far removed, must give proper weight to the moment of peril and the humane instincts that prompted the response thereto." App. 11.

The Wrong Also to the Rescuer

A new trial was also ordered because of the trial court's failure, despite Plaintiff's request (note 3 *supra*), to charge that if Mr. Sanzone, the man in apparent peril, was in danger because of the unseaworthiness of his tug and scow, that unseaworthiness was a wrong also to Plaintiff, as Sanzone's would-be rescuer. That, too, was a correct holding by the Court of Appeals under the "second prong," App. 12, of rescue doctrine law, both common and maritime, *Wagner, supra; Grigsby, supra,* App. 13.

Time-Honored Tort Law

The Court of Appeals merely followed time-honored rescue doctrine tort law in reversing this case for a second trial.

Petitioner does not even complain to this Court about the second, independent ground for reversal.

The Court of Appeals' discretionary reliance on the plain error rule, while correct, was unnecessary. Plaintiff had objected to submission of contributory negligence to the jury four times, A. 16-17, A. 324, A. 513, A. 547-548.

CONCLUSION

Grounds for granting the writ being absent, Respondent prays for denial of certiorari.

Respectfully submitted,

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